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No. 84-531

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CHARLES P. MAHONEY,

Petitioner,

v.

FRANK J. TRABUCCO, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY, and MASSACHUSETTS STATE BOARD OF RETIREMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a challenge under the Age Discrimination in Employment Act to a Massachusetts law which requires all State Police officers to retire at the age of fifty, is the proper focus of the "bona fide occupational qualification" defense upon the duties to which all state troopers are subject, or upon each individual officer's particular assignment?

PARTIES

This Brief in Opposition is submitted on behalf of the respondents: the Massachusetts Commissioner of Public Safety (Frank J. Trabucco) and the Massachusetts State Board of Retirement (referred to collectively herein as "the Commonwealth").

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-14a) is reported at 738 F.2d 35. The opinion of the District Court (Pet. 15a-31a) is reported at 574 F. Supp. 955.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1984. The petition was filed on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case presents a question of the correct interpretation of 29 U.S.C. § 623(f)(1), which provides in pertinent part:

> It shall not be unlawful for an employer . . .
>
> > (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .

The Massachusetts law which is challenged by the petitioner, Mass. Gen. Laws Ann. c. 32, § 26(a)(3), provides in pertinent part:

> Any [member of the uniformed branch of the Massachusetts State Police] who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

STATEMENT OF THE CASE

Introduction

This is not the first time this Court has had occasion to review the Massachusetts law dealing with State Police mandatory retirements. In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), this Court upheld, against an Equal Protection attack, the require-

ment of Mass. Gen. Laws Ann. c. 32, § 26(3)(a) that all members of the Uniformed Branch ("troopers") of the Massachusetts State Police must retire upon reaching the age of fifty. As Murgia succinctly noted: "The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel." 427 U.S. at 310. Murgia held that it was rational for the Legislature to believe that such duties would be performed most safely and effectively by persons under fifty.

On September 13, 1983, the petitioner, a Sergeant in the Massachusetts State Police, brought this suit challenging that same classification under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. A two-day trial was held, in which the only issue was whether the statutory mandatory retirement age was lawful as a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business" of the Massachusetts State Police. 29 U.S.C. § 623(f)(1).

The Trial

At the trial, the Commonwealth introduced evidence directed to a generally recognized, two-part test for evaluating whether an age classification qualifies as a BFOQ:

> (1) the classification must be reasonably necessary to the essence of the employer's business; and (2) the employer must have reasonable cause, that is, a factual basis, for believing either that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1983); see Pet. 3a (First Circuit), 19a (District Court). That evidence included testimony concerning the duties of the State Police and expert testimony relating age to the ability to perform such duties safely and effectively.

Murgia made clear that Mass. Gen. Laws Ann. c. 32, § 26(3)(a) satisfied the first part of the BFOQ test. Pet. 3a (First Circuit), 20a (District Court).

As to the second part, the Commonwealth shouldered the burden of proving a factual basis for the classification.[1/] The expert testimony of a physiologist established that substantially all individuals over 50 lack the aerobic capacity to perform safely and effectively the duties of Massachusetts State Police officers. In addition, a cardiologist testified that the increased incidence, over age 50, of asymptomatic coronory artery disease would make it dangerous to the public safety and to the troopers themselves for troopers to continue to perform State Police duties beyond that age, and that tests could not accurately

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1/ See Heiar v. Crawford County, ___ F.2d ___, 35 EPD ¶ 34,614 (7th Cir., Aug. 20, 1984) at p. 34,724; E.E.O.C. v. County of Santa Barbara, 666 F.2d 373, 376 (9th Cir. 1982).

identify which troopers were not at risk by virtue of this condition. Based upon this factual presentation by the Commonwealth, the District Court concluded:

> Uncontradicted medical testimony indicates that all or substantially all 50 year-olds could not safely and effectively perform the duties of a State Police officer. In addition, uncontradicted medical evidence indicates that it is impracticable or impossible for the Commonwealth to make individual determinations of an officer's fitness to serve on the State Police after age 50. Pet. 24a.

Sergeant Mahoney contended, however, that the BFOQ defense should focus not upon the duties of the State Police generally (to which he admittedly was subject), but instead upon the duties which specifically defined his "particular assignment." Sergeant Mahoney worked in an office with civilians, coordinating information from a computer. Pet. 4a,

21a. He argued that if he were a civilian performing that same assignment, age would not have been a BFOQ. The Commonwealth countered that the petitioner was different from his civilian co-workers because he was, by occupation and in fact, a police officer. The Commonwealth further contended that it was entitled to treat Sergeant Mahoney as a member of that class, as to which age was indisputably a BFOQ. As the District Court found, on the basis of the evidence as to Sergeant Mahoney's duties:

> Sergeant Mahoney remains, however, a sworn member of the uniformed branch of the State Police. He carries a gun on duty. He has a responsibility to aid citizens in emergencies on the state's highways. He is obligated to take action when criminal activity occurs in his presence. He is subject to transfer to another assignment, including one that involves road duty. He is also subject to

call in an emergency situation such as a prison disturbance. Pet. 21a-22a.

The District Court Decision

The District Court went on, however, to side with Mahoney on the critical issue in this case, concluding that the ADEA required the Commonwealth to make individualized determinations of whether age was a BFOQ, and that the relevant focus for BFOQ analysis was upon the actual duties of the particular assignment of each individual trooper as he reached the age of 50. Pet. 24a-27a. Analyzing Sergeant Mahoney's situation, the District Court felt that it was "speculative" that he would be reassigned, and that there was only "the bare possibility" that he would be called upon to perform strenuous physical activity in an emergency. Pet. 28a; see Pet. 5a. On

the strength of these conclusions, the District Court enjoined the respondents from retiring Sergeant Mahoney "as long as he continues to work in his current assignment." Pet. 30a-31a.

The District Court's decision turned, therefore, upon its forecast that it was "unlikely" that the petitioner would in fact be called upon for any physical police activities if he was permitted to remain a State Police officer. Pet. 29a. The District Court thereby imposed yet another burden upon the respondents: in addition to showing that the classification was reasonably necessary to the essence of the business of the State Police (as the District Court found had been done), and to proving that age was a BFOQ for the State Police duties to which the petitioner was subject (which the Dis-

trict Court's findings of fact collectively established), the Commonwealth was to be required to show "likelihood" that a critical situation would occur in which Sergeant Mahoney in particular would be called out, or that an incident would occur to which his duties would require him to respond, or that he would be transferred to a more demanding assignment. The respondents argue below that the BFOQ exemption to the ADEA was not intended to require such a showing.

The First Circuit Decision

As is explored in more detail in the argument, the First Circuit held that the proper focus of the BFOQ inquiry was upon the duties of state troopers generally, and that the uncontradicted testimony that age was a BFOQ for such duties was sufficient to establish the BFOQ de-

fense under the ADEA for all State Police officers. Pet. 5a-8a, 12a-13a. Rejecting the District Court's focus upon an individualized, assignment-by-assignment BFOQ determination, the First Circuit held that the validity of a mandatory retirement statute under the bona fide occupational qualification exemption should be measured by reference to recognized and discrete vocations, such as State Police officer, rather than by a particularistic analysis of the actual duties "likely" to be performed by each specific individual. Pet. 6a-8a, 13a-14a.

REASONS FOR DENYING THE WRIT

The First Circuit correctly held that the proper focus of the BFOQ defense under the ADEA in a public safety context

is upon broadly defined public safety occupations, rather than upon particular assignments. For the following reasons, the writ should be denied.[2/]

I. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The petitioner asserts that the First Circuit decision is in conflict with E.E.O.C. v. Wyoming, 460 U.S. 226 (1983). Pet. 8. But that case held that States

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2/ Of the three questions set forth in the Petition, the second and third are simply attempts to reargue the facts found in this particular case, and clearly are not appropriate for review. Contrary to petitioner's assertions (Pet. 10-11), Sergeant Mahoney himself testified that he was subject to unrestricted transfer, see Pet. 4a, 22a, and that his occupation was that of "State Police officer." Tr. 6. The District Court and the Court of Appeals agreed that, if BFOQ focusses broadly rather than narrowly, the defense was factually established. Pet. 12a, 24a.

could continue to promote public safety through mandatory retirement laws, if they could establish that age was a bona fide occupational qualification for such occupations.

The petitioner quotes this Court as stating that the ADEA "requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case," 460 U.S. at 239, but ignores the crucial qualification which follows: "Perhaps more important, appellees remain free under the ADEA to continue to do precisely what they are doing now, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden." Id. at 240 (emphasis in original). This Court thus drew a distinction between individualized determinations on the one

hand, and proof of BFOQ on the other; and the Commonwealth provided the required demonstration through its uncontested expert testimony at trial in this case.

II. THE CONFLICT AMONG THE CIRCUITS IS OVERSTATED.

A conflict among the circuits will not justify review unless it is "real and embarassing." Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955), quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). There is no such real and embarassing split here, and the petitioner engaged in a considerable overstatement when he suggests (Pet. 5-7) that five circuit Courts of Appeals are split on the issue presented.

The Fourth Circuit

Johnson v. Mayor & City Council of Baltimore, 731 F.2d 209 (4th Cir. 1984), petition for cert. filed, No. 84-518, did not address the question presented by the Petition in this case. Johnson held that age 55, by virtue of P.L. 93-350, 88 Stat. 356, codified at 5 U.S.C. § 8335(b), which mandates retirement for most federal firefighters upon reaching that age, is reasonable and lawful under 29 U.S.C. § 623(f)(1) for all state and local firefighters. 731 F.2d at 212-13. As a result of this ruling, it was unnecessary for the Fourth Circuit to address the proper focus of the BFOQ in the absence of such a per se federal standard. To the extent that the Fourth Circuit approach in Johnson sustains the validity of a mandatory retirement provision for

a broadly defined class of firefighters, that result is consistent with the decision below.

The Sixth Circuit

Nor does Tuohy v. Ford Motor Company, 675 F.2d 842 (6th Cir. 1982), address this issue: there was no dispute in that case concerning the focus of the BFOQ inquiry. The question instead was whether Ford could rely, in support of an age 60 mandatory retirement for its corporate pilots, upon an age-60 rule of the Federal Aviation Administration which applied to commercial but not corporate pilot licenses. The holding in Tuohy was simply that Ford could not rely upon the FAA rule, but must instead "present a factual basis for its determination that medical science cannot predict, on an individual basis, the likelihood that

a pilot who has reached age 60 will become incapacitated during flight." 675 F.2d at 846.

The Seventh Circuit

In E.E.O.C. v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980), the Seventh Circuit held that the BFOQ defense should focus upon the "particular business" of law enforcement, not upon the particular duties of a police chief. 530 F.2d at 1258. This holding is certainly not in conflict with the result below.

The Eighth Circuit

The Eighth Circuit in E.E.O.C. v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982), rejecting Janesville, held that the duties of a fire chief were sufficiently distinct from those of a fire-

fighter so as to be treated separately. 671 F.2d at 1164-66. Although St. Paul conflicts with Janesville, its rationale does not necessarily conflict with the decision below, with which it shares a focus upon occupations.

The Decision Below

The District Court in this case expressly adopted the Eighth Circuit approach, Pet. 26a, but, in the respondents' view, went beyond it in focussing upon particular assignments. Since age was not a BFOQ for the particular assignment of Sergeant Mahoney, but was a BFOQ for the state police duties to which he was subject, the appeal was taken as a pure issue of law with reliance upon the approach of the Seventh Circuit.

Although petitioner argues that the First Circuit decision perpetuates and

expands this conflict, the appropriate perspective is that it tends to resolve it. In a process of balancing and reconciling the various interests underlying the prior decisions, the First Circuit ruled that the correct BFOQ focus is upon an occupation in the sense of "vocation," a concept falling between the Seventh Circuit's emphasis on "particular business" on the one hand, and the Eighth Circuit's emphasis on the duties of a particular position on the other. Pet. 6a-8a. This approach tends to resolve the conflict between Janesville and St. Paul, not to create or perpetuate a conflict. In addition, as noted above, the First Circuit decision was faithful to the intervening consideration of the BFOQ exemption in E.E.O.C. v. Wyoming, 460 U.S. 226 (1983).

III. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH CONGRESSIONAL INTENT.

The statutory language of the BFOQ provision could hardly be more plain. Congress did not provide that age must be a BFOQ for each individual employee's "particular assignment;" it provided instead that age must be a BFOQ "reasonably necessary to the normal operation of the particular business."

The evidence demonstrated, and the District Court found, that age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business of the Massachusetts State Police. In inquiring further into whether age was a BFOQ for the plaintiff's particular assignment, the District Court imposed upon the state a burden not contemplated or authorized by Congress.

The petitioner argues that the First Circuit decision was contrary to the general congressional intent underlying the ADEA. Pet. 7-8. The more relevant question is whether the First Circuit was faithful to the specific congressional intent underlying the BFOQ exemption. Legislative history relevant to this question is marshalled at Pet. 12a-15a by the First Circuit, and demonstrates that the congressional intent "is consistent with a properly justified across-the-board BFOQ for a class of employees such as the uniformed branch of state troopers in the instant case." Pet. 12a.

IV. THE FIRST CIRCUIT DECISION IS CONSISTENT WITH PUBLIC POLICY.

As the First Circuit noted (Pet. 13a), the same Congress which extended

coverage of the ADEA to federal, state, and local governments established mandatory retirement for federal public safety occupations. P.L. 93-350, 88 Stat. 356 (1974), codified in part at 5 U.S.C. § 8335. These federal age limitations reflect congressional acceptance of the same policy objectives which underlie the mandatory retirement of Massachusetts State Police officers. As Senatory Percy remarked:

> "It is the intent of this legislation to help federal law enforcement and firefighters agencies maintain a relatively young, vibrant, and effective work force, both for the safety of individual officers, and for the society which they serve."

Hearings on H.R. 9281, before the Subcomm. on Compensation and Employee Benefits of the Sen. Comm. on Post Office and Civil Service, 93rd Cong., 2d Sess.

(April 24, 1974).[3/]

The purposes of public safety forces raise important public policy considerations in the face of an age discrimination claim. The protection of the safety of its citizens is one of the most fundamental responsibilities of a state. In order to carry out that responsibility effectively, the state must retain some reasonable discretion to require each individual in a public safety force to be available for physical tasks, even though the likelihood of physical in-

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3/ The First Circuit decision is not based upon the rationale of Johnson v. Mayor and City Council of Baltimore, 731 F.2d 209 (4th Cir. 1984), that the federal statutes make age 55 per se reasonable and therefore a BFOQ for public safety positions. See also Heiar v. Crawford County, supra at p. 34,730 (Gibson, S.C.J., dissenting); but see id. at p. 34,725-26 (majority opinion).

volvement in a particular assignment may be small. Physical requirements for public safety officers cannot responsibly be based on the least, rather the most demanding of potential assignments or duties.

Contrary to the petitioner's assertions (Pet. 9-10), the "particular assignment" approach has adverse public policy implications. Under the analysis of the District Court, a force designed and prepared for rapid response to major crises may not justify age limitations intended to enhance preparedness by identifying its most physically stressful assignments. Rather, according to the District Court, the state must demonstrate, to some undetermined degree of probability, that each officer reaching the maximum age is "likely" to perform

physical tasks. This burdensome requirement undermines effective law enforcement and would thwart the terms and purpose of the BFOQ exemption.

By drawing the BFOQ defense provided in § 623(f)(1) to such narrow compass, the District Court also exposed the Commonwealth to an endless series of lawsuits, each suit considering the particular duties and assignments of specific individuals. The dissent in E.E.O.C. v. Wyoming, supra, commented that the defense of such lawsuits "is a costly and time-consuming endeavor that is, in itself, a burden impermissible for Congress to impose on the states." 460 U.S. at 258 n. 5 (Burger, Ch. J., dissenting).

Restriction of the BFOQ defense to particular assignments would encourage some officers approaching fifty to avoid

physical activity that might jeopardize their claim under the ADEA. They might, for example, seek safe harbor at an administrative assignment, hopeful that their sinecure will turn out to insulate them from the rigors of other duties and insure their tenure beyond age 50. At worst, those in active positions might avoid physical tasks required by their duties or necessitated by crises such as prison disturbances. Under these circumstances, the District Court's interpretation of the BFOQ defense would pit the personal interest of the officer against the oath of his office and the mission of the Massachusetts State Police. These personal conflicts can collectively thwart the protection of the citizens of Massachusetts.

The District Court's approach would, by contrast, penalize the conscientious officer who takes carrying out the essential function of the State Police more seriously. Those officers, not having shirked from demanding assignments, would be subject to mandatory retirement as a result. The District Court appeared to sense, correctly, that there was a fundamental inequity to its decision on this score. Pet. 29a-30a.

Significantly, the interpretation of the BFOQ exemption adopted by the First Circuit does not remove the burden from the state to prove a factual basis for age restrictions, nor does it compromise the protection afforded the individual by the ADEA against arbitrary discrimination. This approach to the BFOQ still permits the trier of fact to weigh the

evidence submitted on the affirmative defense and thereby to judge the factual basis for, and reasonableness of, the age restriction.

Application of the exemption to the State Police force thus creates no conflict with the terms or purposes of the ADEA. Rather than undermining the individual protections of the law, the First Circuit approach to the exemption tracks the dual Congressional purposes of prohibiting arbitrary age discrimination without impairing or inhibiting rational, factually justified employment decisions in hazardous public safety businesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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